

WILMER, CUTLER & PICKERING

2445 M STREET, N.W.
WASHINGTON, D.C. 20037-1420

TELEPHONE (202) 663-8000
FACSIMILE (202) 663-8383

4 CARLTON GARDENS
LONDON SW1Y 5AA
TELEPHONE 011 (44)711 639-4468
FACSIMILE 011 (44)711 639-3537
RUE DE LA LOI 15 WETSTRAAT
B-1040 BRUSSELS
TELEPHONE 011 (32)21 231-0903
FACSIMILE 011 (32)21 230-4322

FRIEDRICHSTRASSE 95
BRIEFKASTEN 29
D-10117 BERLIN
TELEPHONE 011 (49)301 2022-8400
FACSIMILE 011 (49)301 2022-8500

ALEX E. ROGERS
DIRECT LINE (202)
663-6256

INTERNET AROGERS@WILMER.COM

December 30, 1997

Hand Delivery

Lawrence M. Noble, Esq.
Office of the General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

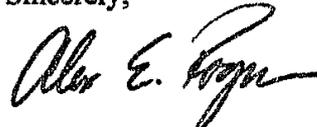
Re: MUR 4689

Dear Mr. Noble:

On behalf of Respondent ABC Radio Networks, Inc. in the above-captioned matter, I respectfully submit the following: (1) Response of ABC Radio Networks, Inc.; and (2) Affidavit of Frank L. Raphael in support thereof.

I have enclosed one additional copy of each document. Please date stamp these copies and return them to the messenger. Thank you for your assistance.

Sincerely,



Alex E. Rogers

Enclosures

cc: David Cohen, Esq.

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ABC, Inc.



David Cohen
General Attorney
Law & Regulation

December 29, 1997

Lawrence M. Noble, Esq.
Office of the General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: MUR 4689

Dear Mr. Noble:

I write on behalf of ABC Radio Networks, Inc., owner of the ABC Radio Networks ("ABC Radio"), in response to the complaint filed with the Federal Election Commission ("FEC" or the "Commission") by the California Democratic Party ("CDP") in the above-captioned matter. In its letters dated March 18 and October 17, 1996, the CDP contends that certain program appearances made by former Congressman Robert Dornan on "various radio broadcast stations around the country" allegedly constituted a prohibited corporate contribution, in violation of the Federal Election Campaign Act of 1971 ("FECA" or the "Act"). However, for the reasons set forth herein, the Commission should dismiss this frivolous complaint because it is impermissibly vague and because the FECA "media exemption" fully insulates respondents' activities from the CDP's attack. Accordingly, the Commission should find "no reason to believe," and the complaint should be summarily dismissed.

Facts

Several ABC, Inc.-owned stations offer, as part of their programming mix, a substantial concentration of news, talk and political commentary. See Affidavit of Frank L. Raphael ("Aff."), sworn to December 23, 1997, attached hereto. These stations endeavor to inform and entertain their audiences with the opinions of knowledgeable, often controversial, people including prominent public figures. Aff. ¶ 4. Three ABC-owned stations¹ entered into affiliation agreements with Premier Broadcasting Services, the independent syndicator of The Michael Reagan Show (the "Reagan Show"), by which these stations licensed the right to broadcast the program. The Reagan Show features the political and social issues of the day as the subject of

¹ KSFO(AM) (San Francisco), WJR(AM) (Detroit) and WMAL(AM) (Washington, DC).

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often vigorous debate.² *Id.* However, these stations' rights and obligations under their affiliation agreements are not dependent on the views expressed on the show. *Id.*

Mr. Dorman appeared as a guest host on the Reagan Show on or about the week of March 31, 1997. Aff. ¶ 5. The decision to invite Mr. Dorman to appear was made without the knowledge or participation of any ABC entity. *Id.* No ABC, Inc.-owned station paid Mr. Dorman for his appearance, nor was his appearance in any way contingent on the views he expressed. *Id.* Indeed, no ABC, Inc.-owned station had advance notice or control over the content of the Reagan Show or over whether Mr. Dorman would guest host. *Id.*

The named respondent, ABC Radio, is an indirect subsidiary of ABC, Inc. ("ABC"). ABC Radio does not own or control any radio stations and did not broadcast any of the three programs cited in the CDP letter: "The Oliver North Show" (the "North Show"), "The Alan Keyes Show" (the "Keyes Show") and the Reagan Show (collectively, the "Programs"). While ABC Radio does not produce or broadcast the Programs, it does lease satellite time to the Programs' independent syndicators -- Premier Broadcasting Services and Salem Broadcasting -- to enable them to transmit the Programs to remote licensing stations. Aff. ¶ 3. However, neither of the Programs' syndicators advises ABC Radio of the content of its programming prior to transmission and ABC Radio does not pre-screen transmitted material. *Id.*

Neither ABC, ABC Radio, KSFO, WJR nor WMAL (collectively, the "ABC Entities") is owned or controlled by any political party, political committee, or candidate. Aff. ¶ 6.

I. The Complaint Is Impermissibly Vague And Does Not Satisfy Commission Standards

Although the media exemption is a complete defense to the complaint, we first briefly address the procedural defects that independently mandate dismissal.

A. The Responding Parties Are Not Adequately Identified

The complaint is defective in that it does not sufficiently identify the responding parties. FEC Regulation (11 C.F.R.) 111.4(d)(1) provides that a complaint "should clearly identify as a respondent each person or entity who is alleged to have committed a violation." Here, the complaint letters merely refer generally to unnamed "various radio broadcast stations across the country." But complainant makes no attempt to list those stations that actually carried the Programs and identifies none of the ABC Entities. Failure to satisfy even this basic pleading requirement warrants dismissal.

² No ABC-owned radio station carries the Alan Keyes or Oliver North Shows.

B. The Complaint Does Not Specify The Allegedly Offending Language

FEC Regulation 111.4(d)(2) mandates a "clear and concise recitation of the facts which describe a violation." Here, again, the complaint is deficient because it lacks any recitation of the on-air statements that allegedly constituted impermissible "express advocacy" of the election or defeat of a clearly identified candidate. *Cf. Maine Right to Life Committee v. FEC*, 914 F. Supp. 8 (D. Maine 1996) (reciting narrow list of phrases which directly advocate the election or defeat of an identifiable candidate), *aff'd*, 98 F.3d 1 (1st Cir. 1996), *cert. denied*, 118 S. Ct. 52 (1997). The CDP's vague assertion that the "purpose" of Mr. Dornan's remarks was to "attack Congresswoman Sanchez on campaign contributions and other activities related to the 1996 campaign and to promote his own candidacy," is not specifically supported anywhere in the complaint, and such conclusory allegations fail to state a claim under FECA. Thus, the complaint is not in substantial compliance with the FEC's pleading requirements and no "reason to believe" should be found.

II. ABC Radio Is Not A Proper Respondent

Despite the complaint's failure to identify any specific respondents, ABC Radio received an FEC inquiry letter.³ However, ABC Radio is not a proper respondent in this proceeding. ABC Radio is a provider of news and programming services to its affiliates, but does not own any broadcast stations and did not air the Programs. *Aff. ¶ 2.*

ABC Radio's sole connection to the Programs is as a provider of satellite services to the independent syndicators wishing to lease time for the shows' distribution. *Aff. ¶ 3.* However, at no time prior to transmission of the Programs is ABC Radio made aware of the Programs' content. *Aff. ¶¶ 3, 5.* It would be prohibitively expensive and competitively impracticable for ABC Radio to pre-screen all programming material before transmission. *Aff. ¶ 3.* We are aware of no authority -- and the complaint cites none -- to support the proposition that a media corporation that leases satellite time on routine commercial terms to program syndicators, makes a contribution to a person who appears on the program at the behest of the syndicator. But, as shown below, even if the sale of satellite services constitutes a "contribution" under the Act, the media exemption would immunize ABC Radio. Thus, for this reason, too, the complaint should be dismissed.

³ The CDP complaint does not specifically identify ABC Radio or any other radio station or network as having carried these programs. However, the FEC's November 12 cover letter alleges that "ABC Radio Networks and the Michael Reagan Show" may have violated the Act.

In any event, as discussed below, the ABC Entities are media entities exempt from the constraints of the Act. Thus, on substantive grounds as well, the complaint must be dismissed.

III. The ABC Radio Networks And ABC-Owned Radio Stations Are Protected Media Entities

1. Congress Protected The "Unfettered" Right Of The Media To Publish News And Commentary

The Act prohibits corporate contributions or expenditures in connection with federal elections. 2 U.S.C. § 441b (a). However, in enacting FECA, Congress was careful not to impinge on the rights of a free and vibrant press and thus exempted from the reach of the Act "any news story, commentary or editorial distributed through the facilities of any broadcasting station . . . unless such facilities are owned or controlled by any political party, political committee, or candidate." 2 U.S.C. § 431 (9)(B)(1) (emphasis added); see also 11 C.F.R. §§100.7 (b) (2) and 100.8 (b)(2) (the term "contribution" does not include "any cost incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station" unless owned or controlled by a political candidate or party).

The legislative history of the Act makes plain that "it is not the intent of Congress in [FECA] to limit or burden in any way the first amendment freedoms of the press or of association. [The media exemption] assures the unfettered right of the newspapers, television networks, and other media to cover and comment on political campaigns." H.R. Rep No. 93-1239, 93rd Congress, 2d Sess., p. 4 (1974) (emphasis added). Thus, Congress recognized that rules designed to regulate campaign contributions to federal candidates must yield to the constitutionally guaranteed freedoms of the press.

In accordance with this Congressional directive, the FEC employs a two-part test to determine whether an entity qualifies for the "media exemption": 1) the media entity must not be owned or controlled by a candidate or political committee; and 2) the media entity must be performing a legitimate press function in disseminating the complained of statements. See FEC v. Phillips Publishing, Inc., 517 F. Supp. 1308, 1312-13 (D.D.C. 1981); Reader's Digest Association, Inc. v. FEC, 509 F. Supp. 1210, 1214-15 (S.D.N.Y. 1981) (applicability of media exemption turns on "whether the press entity was acting as a press entity" as opposed to "acting in a manner unrelated to its publishing function"); see also FEC v. Massachusetts Citizens For Life, 479 U.S. 238, 250-51 (1986) (Court's analysis of applicability of media exemption focuses on whether challenged statements were published within ordinary course of media entity's business); AO 1982-44; AO 1980-109. If these conditions are met, there can be no violation of the Act.

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The ABC Entities satisfy these conditions and thus qualify for the media exemption to the Act; no further investigation is required for the FEC to reach this conclusion. ABC, directly and through its broadcast subsidiaries, owns ten television stations and over two dozen radio stations including KSFO(AM) in San Francisco, WJR(AM) in Detroit and WMAL(AM) in Washington, D.C. Aff. ¶ 4. Neither ABC Radio nor the ABC-owned stations is owned or controlled by any political party, political committee, or candidate, nor does the CDP allege to the contrary. Aff. ¶ 6. Thus, the first criterion is clearly met.

The second condition -- that a media entity must be performing a legitimate press function -- is also met here. The dispensing of political commentary is a classic example of a "legitimate press function" that falls squarely within the media exemption. See AO 1982-44 and AO 1980-109, discussed infra. As part of their programming mix, these ABC-owned stations offer a substantial concentration of news, talk shows and political commentary. Aff. ¶ 4. The viewpoints of knowledgeable, often controversial people, including prominent public figures, are featured during vigorous debate over the issues of the day. Id.

KSFO, WJR and WMAL have carried all or part of the Reagan Show at times over the past year. The Reagan Show offers provocative commentary on a wide range of political and social issues. From time to time, the Reagan Show is hosted by prominent guests, such as Mr. Dorman. As noted, the ABC-owned stations play no role in the selection of guest hosts for the Reagan Show. Aff. ¶ 5. But irrespective of the identity of the host, broadcast of the program remains, undiminished, an exercise of the ABC-owned stations' legitimate press function.⁴ Thus, the ABC Entities are clearly media entities, operating as such in the dissemination of their programming, including the Reagan Show.

Accordingly, the second criterion for the media exemption is likewise met. Thus, there can be no "reason to believe" the complaint, which must be dismissed.

2. The Media Exemption Applies Regardless Of Content

The vital protections afforded by the "media exemption" require that, once an entity satisfies the two-part test, the Commission is precluded from inquiring into the substance of the challenged communication. See, e.g., FEC v. Phillips, 517 F. Supp. at 1312-13; Reader's Digest, 509 F. Supp at 1214-15. The potential harm to the media from an overbroad reading of the Act's

⁴ It is worth noting that the stations' rights and obligations under the affiliation agreements with the syndicator of the Reagan Show are in no way dependent on the views espoused by Mr. Reagan or any guest host. Aff. ¶¶ 4-5.

reach is a matter of substantial concern.⁵ As the Reader's Digest court observed in deciding whether distribution of a videotape reenactment of the Chappaquidick accident constituted a corporate contribution:

[F]reedom of the press is substantially eroded by investigation of the press, even if legal action is not taken following the investigation. Those concerns are particularly acute where a governmental entity is investigating the press in connection with the dissemination of political matter. These factors support the interpretation of the statutory exemption as barring even investigation of press activities which fall within the exemption.

509 F. Supp. at 1214 (emphasis added). Since, as shown above, the ABC Entities are covered by the media exemption, there is no cause for the Commission to inquire into the content of the broadcasts at issue.

3. The Media Exemption Is To Be Broadly Construed

The media exemption clothes with immunity the broadcast of statements having a direct impact on a particular candidate or election. In AO 1982-44, the Commission held that the media exemption extends to a television's station donation of free air time to both the Democratic and Republican National Committees to espouse their positions, encourage viewer support of particular candidates and solicit contributions. In reaching its decision, the FEC noted that the distribution of free time by the television station was within its legitimate broadcast functions and that the proposed program was a "form of commentary falling within the press exemption." Id. In addition, the Commission explained that the media exemption contains no content-based or temporal restrictions. Id. ("The statute and regulations do not define the issues permitted to be discussed or the format in which they are to be presented.") The Commission found that this result was consistent with the "unfettered right" of a broadcast entity "to cover and comment on political campaigns."⁶ Id. (Citing H.R. Report No. 93-1239, p.4.) See also Phillips, 517 F. Supp. at 1312 (In granting an "unfettered right" to the media to comment free from the potentially chilling effect of FECA, Congress intended that the media exemption be "a broad

⁵ Cf. Maine Right to Life Committee v. FEC, 914 F. Supp. at 12 ("the Supreme Court has been most concerned not to permit intrusion upon 'issue' advocacy -- discussion of the issues on the public's mind from time to time or of the candidate's positions on such issues").

⁶ The AO 1982-44 decision was cited by the FEC as recently as last year in AO 1996-16. In addition, the Commission has recently decided to take "no action" in separate complaints against ABC's owned and operated radio stations WABC(AM) [MUR 4099] and WBAP(AM) [MUR 4212]. In each instance, by letter dated March 7, 1996, the Commission recognized that commentary by a media entity was exempt from the reach of the Act.

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one.”).⁷

Similarly, in AO 1980 - 109, the Commission addressed an inquiry from the publisher of a periodical entitled The Ruff Times:

Mr. Ruff has indicated, you say, that he may endorse specific candidates in his commentary . . . and may urge his subscribers to support such candidates with their votes and with contributions to the candidates or to committees who support the candidates.

(Emphasis added.) The Commission concluded that, so long as the publisher was not acting as a “conduit or intermediary” for the candidate, Mr. Ruff’s recurring columns fell within the statutory exemption for commentary even though the periodical would explicitly exhort the public to vote for and send contributions to particular candidates. See also MUR 3366 (finding “no reason to believe” that ABC Radio stations violated the Act by employing a candidate for federal office as a political commentator because, inter alia, the media exemption insulated the daily broadcasts).

Commission precedent, therefore, holds unambiguously that statements broadcast by an independent media entity, even if of tangible benefit to a candidate, constitute “commentary” exempt from the Act. Indeed, as reflected in the cited Advisory Opinions, the Commission has reached this result even where the media entity donated time knowing in advance that a contribution would be solicited.

Here, of course, the ABC Entities had no advance notice of the subjects to be broached on the Reagan Show, or any say into who would guest host. Moreover, Commission and court precedent make clear that, regardless of the identity of the messenger, debate over the acts and processes of government is precisely the type of speech which Congress sought to protect. Under these circumstances, the Commission can properly give effect to the Congressionally mandated media exemption without fear of subverting the objectives behind the Act.

⁷ Indeed, the complaint cites no Commission authority and we are unaware of any instance where the Commission has denied the media exemption to any news story, commentary or editorial, produced by a media entity, that reflected the subjective views of the broadcaster, publisher or commentator.

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Lawrence M. Noble, Esq.

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December 29, 1997

Conclusion

For all the foregoing reasons, the procedural and substantive deficiencies of the complaint make clear that MUR 4689 does not warrant further FEC attention. Accordingly, the Commission should determine there is "no reason to believe" the CDP's allegations and dismiss the complaint.

Very truly yours,



David Cohen

DC/ak

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ELECTION COMMISSION

-----X
:
Re: MUR 4689 :
:
-----X

**AFFIDAVIT OF
FRANK L. RAPHAEL**

STATE OF NEW YORK)
 : ss.
COUNTY OF NEW YORK)

FRANK L. RAPHAEL, being duly sworn, deposes and says:

1. I am vice president of network programming for ABC Radio Network, Inc. ("ABC Radio"). My responsibilities include supervision of the ABC Radio Networks talk programs. I submit this affidavit in support of ABC Radio's response to the above-captioned complaint filed with the Federal Election Commission ("FEC") by the California Democratic Party ("CDP"), on October 17, 1997. Unless stated on information and belief, I have personal knowledge of the facts set forth herein.

2. The ABC Radio Networks is owned by ABC Radio Network, Inc., an indirect subsidiary of ABC, Inc. ("ABC"). ABC Radio provides certain news and programming services to its affiliated stations. However, ABC Radio does not own or control any radio stations and did not broadcast any of the three programs cited in the CDP letter: "The Oliver North Show" (the "North Show"), "The Alan Keyes Show" (the "Keyes Show") and the Michael Reagan Show ("Reagan Show") (sometimes collectively referred to as the "Programs").

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3. ABC Radio provides satellite transmission services to various clients who wish to transmit their program signals to remote locations. While ABC Radio does not produce or broadcast the Programs, it does lease satellite time to the Programs' independent syndicators to enable them to transmit the Programs to licensing stations. None of the Programs' syndicators inform ABC Radio about the content of their programming prior to transmission. It would be impracticable for ABC Radio to monitor each program prior to its transmission via satellite. Not only would doing so be prohibitively expensive, but satellite customers are rarely willing to have their programming material pre-screened by a potential competitor.

4. As part of their programming mix, several ABC-owned stations offer a substantial concentration of news, talk and political commentary. These stations endeavor to inform and entertain their audiences with the viewpoints of knowledgeable, often controversial people, including prominent public figures. As such, programs broadcast by these stations often feature the salient political and social issues of the day as the subject of vigorous debate. The Michael Reagan Show (the "Reagan Show") is such a program. Three ABC-owned radio stations have entered into affiliation agreements with Premier Broadcasting Services, an independent program syndicator, for the right to carry all or part of the Reagan Show: KSFO(AM) (San Francisco), WJR(AM) (Detroit) and WMAL(AM) (Washington, D.C.). However, the ABC-owned stations' rights and obligations under their affiliation agreements are not dependent on the views expressed on the Reagan Show.

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5. On information and belief, Mr. Dornan appeared as a guest host as part of a regularly scheduled broadcast of the Reagan Show during the week of March 31, 1997. No ABC-owned station paid Mr. Dornan for his appearance on the Reagan Show, nor was his appearance in any way contingent on the views he expressed. Indeed, no ABC-owned station has advance notice or control over the content of the Reagan Show, or any say over who will guest host.

6. Neither ABC Radio, KSFO, WJR, WMAL, nor any other ABC owned or affiliated company, is owned or controlled by any political candidate, political party or campaign.


FRANK L. RAPHAEL

Sworn to before me this
23 day of December 1997.


Notary Public

DAVID COHEN
Notary Public, State of New York
No. 31-4990471
Qualified in New York County
Term Expires Jan. 6, 1998

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